

# SECRETARY'S RECORD, PUBLIC SERVICE COMMISSION

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## BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on ) Rule and Regulation No. 202  
its own motion, seeking to amend )  
Title 291, Chapter 16, to adopt )  
Reverse Auction and Wireless ) ORDER ISSUING CERTIFICATE OF  
Registry rules and regulations in ) ADOPTION  
accordance with Nebraska Legislative )  
Bill 994 [2018]. ) Entered: July 14, 2020

### APPEARANCES:

#### **For the Rural Independent Companies:**

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#### **For the Rural Telecommunications Coalition of Nebraska:**

Mr. Andy Pollock  
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#### **For CTIA:**

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#### **For the Commission:**

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### BY THE COMMISSION:

On January 22, 2020, The Commission released an order scheduling a hearing on proposed rules and regulations in Title 291, Chapter 16, in accordance with Legislative Bill 994 [2018]. On February 13, 2020, the Hearing Officer entered an order correcting the attachment to the January

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22<sup>nd</sup> Order, and rescheduling the hearing. Because of COVID-19 restrictions, the Commission again rescheduled the hearing and re-noticed the hearing as a virtual hearing to be conducted via videoconference. On May 19, 2020, after duly published notice, the Commission held a video hearing on the revised rule amendments. The written comments and reply comments were offered and received into the record. Appearances were entered as indicated above.

Generally, most commenters were critical of the proposed rules. Some wanted more detailed definitions or descriptions about what constituted grounds for withholding NUSF support. The Rural Independent Companies (RIC) for example, requested the Commission define the terms complaint and docket. Frontier and CenturyLink requested the Commission further define what constitutes a sufficient level of investment and when withholding of support could occur. Windstream commented that the rules were unconstitutionally vague.

The Commission understands that there is a certain level of anxiety associated with a determination which may result in the withholding of NUSF support under the rules. However, the Commission reiterates that such withholding could have similarly occurred under the previous statutory framework. Neb. Rev. Stat. § 86-324 has provided a means for the Commission to act where carriers are not using NUSF support for the purpose in which support was intended. Noncompliance with Commission orders has also been the basis for the Commission to withhold support. LB 994 did not change the fact that the Commission has had the ability to withhold support. However, LB 994 provided an additional reason for the Commission to consider withholding support where sufficient investments have not been made and prompting the Commission to look at another eligible telecommunications carrier willing to utilize NUSF support to make those investments. Additionally, we note that under the statute and revised rules attached hereto, the withholding of support would not occur absent notice and an opportunity for a hearing.

We decline at this time to add RIC's additional definitional changes. We believe that changing the word to the plural form as used in the statute indicates that "complaints" as requested by some of the commenters lends itself to the more common use of the word rather than the formal use of the word complaint. In addition, we do not think that the legislature intended that a consumer be required to file a formal legal document alleging a specific violation against a party, along with a payment of a filing fee, and possibly obtaining legal representation, in order for the Commission to consider withholding support for a lack of broadband service. Rather, we believe the legislature meant that the Commission should consider the more common way in which consumers reach out to the Commission about the lack of broadband in their area as an indicator of whether broadband has been deployed. That is not to say that a consumer is prohibited from filing a formal complaint pursuant to our rules of procedure. However, we find that should not be the only avenue consumers can inform the Commission of this deficiency. In

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addition, we decline to add the term docket as we do not believe such term has a specific meaning that needs to be defined where these proposed rules are concerned. However, should that become an issue, the Commission may revisit this issue and add this or other definitions where necessary.

We also decline to further define what sufficient level of investment would mean in response to Frontier's comments. We believe that threshold would not be a constant measure, but rather would depend upon a fact-specific analysis. Sufficiency of investment may depend on a number of fact-specific characteristics such as the resources the carrier had to invest, explicit support mechanisms, and the size and makeup of a geographic area.

CenturyLink recommended the Commission incorporate more specific language in its rules regarding how and when the Commission would open an investigation and withhold portions of the NUSF support. The Commission believes that the proposed rule amendments in § 001.03 provides a sufficient framework specifying what would trigger an investigation. CenturyLink also requested the Commission be mindful of potential overbuilding concerns and safeguards for equal and non-discriminatory access to poles, rights of way, easements and leasing arrangements. The Commission agrees with CenturyLink that any redirection of support should be tailored to provide support to unserved and underserved areas. The Commission also agrees that the provider receiving redirected support either through a community-based plan or a winning auction bid should be required to follow the same obligations as other eligible telecommunications carriers. We believe that is sufficiently reflected in proposed § 001.05(C).

RTCN had previously suggested the addition of a community-based plan approach as an intermediate step to solve an issue regarding the lack of broadband in a specific area. The Commission had added proposed rules in section 001.04. Commenters were split on whether these rules should be adopted. The Commission finds it should keep this section in the revised rules as it could be a beneficial way to provide funding to a provider willing to deploy broadband. The Commission would not be required to utilize this approach. Rather, it would be an option which could be used by the Commission to determine which eligible telecommunications carriers have an interest in providing broadband in a certain area and redirecting support in a manner that may be more efficient.

Windstream recommended the Commission delay the rulemaking. Windstream argued that the Commission's draft rules were not specific enough and were constitutionally vague. Windstream did not offer specific rule amendments for the Commission's consideration. The Commission finds Windstream's arguments lack merit. The Commission made clear that further guidance as to unserved and underserved areas would be provided through Commission orders as has been historically the case. As for the rules pertaining to the auction framework, those rules were largely modeled

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on the FCC's rules. The Commission sees no benefit at this time to add more to § 001.05 of its rules.

In response to CTIA's comments, the Commission declines to accept many of their proposed rule amendments offered in its April 18, 2019, comments and reiterated at the hearing on May 19, 2020. If the purpose of the wireless registry is to determine areas eligible for support from the NUSF fund, the Commission has a vested interest in investigating the accuracy of the information received not only in terms of voice coverage but in broadband coverage, as the dedicated wireless fund provides support for broadband capable wireless towers. The Commission also has an interest in making sure that funds spent are being used for the purpose in which they are intended, which would include gathering information in a number of ways including, but not limited to, crowd sourcing. However, the Commission corrected the cross reference in the proposed rule amendments.

## O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the rules attached hereto be and they are hereby adopted.

ENTERED AND MADE EFFECTIVE at Lincoln, Nebraska, this 14<sup>th</sup> day of July, 2020.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

  
  
  




Chair

ATTEST:

  
Executive Director

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## TITLE 291 - NEBRASKA PUBLIC SERVICE COMMISSION

### CHAPTER 16 - REVERSE AUCTION AND WIRELESS REGISTRY RULES AND REGULATIONS

#### 001. SCOPE, DEFINITIONS, AND STATE CODE.

001.01 SCOPE AND APPLICATION: The scope and applicability of these rules and regulations is described in Neb. Rev. Stat. §§ 75-160 and 86-330.

001.02 DEFINITIONS: The terms and definitions in Neb. Rev. Stat. § 86-319 through 86-322 and in Neb. Admin. Code Title 291, Chapter 10, are hereby incorporated into this chapter. Such terms not specifically identified in statute or existing rules are defined below.

001.02(A) "Reverse Auction" as used in § 86-330 means an auction process to determine redistribution of support from the fund.

001.02(B) "Support" means payments from the fund allocated by the Commission to an ETC for such ETC's eligible expenses associated with broadband Internet infrastructure deployment in an Unserved Area or an Underserved Area within the State of Nebraska.

001.02(C) "Unserved Area" or "Underserved Area" means any location in the State of Nebraska that does not have access to broadband Internet service as defined by the Commission.

#### 001.03 WITHHOLDING OF NEBRASKA UNIVERSAL SERVICE FUND SUPPORT.

001.03(A) Consistent with Neb. Rev. Stat. § 86-330, after notice and hearing, the Commission may withhold Support from an eligible telecommunications carrier (ETC):

001.03(A)(i) on the basis of consumer complaints or on the Commission's own motion, after making a finding that:

001.03(A)(i)(a) the availability, quality, or affordability of broadband or telecommunications service provided by the ETC is lacking; or

001.03(A)(i)(b) the ETC has failed to follow the criteria for successful investment of support from the fund;

001.03(A)(ii) Where an ETC has failed to comply with the requirements established by the Commission in orders pursuant to Neb. Rev. Stat. § 86-324; or

001.03(A)(iii) Where Commission-approved projects were not completed according to the Commission's requirements.

## 001.04 COMMUNITY-BASED REDIRECTION OF SUPPORT

001.04(A) The Commission may consider community-based plans for redirection of support that has been withheld from an ETC.

001.04(B) To qualify for Commission consideration, a community-based plan will include an ETC.

001.04(C) The Commission may consider community-based plans based on the following scoring criteria:

001.04(C)(i) The history of the participating eligible telecommunications carrier in providing quality and affordable telecommunications and broadband services in rural areas;

001.04(C)(ii) The capability of the ETC to use the proposed technology to provide broadband services to every location in the exchange on a reasonably comparable basis;

001.04(C)(iii) The support of local businesses, hospitals, schools, colleges, agricultural producers, and residents;

001.04(C)(iv) Other sources of funding;

001.04(C)(v) Partnerships and other cooperative arrangements with local public power providers;

001.04(C)(vi) Partnerships and other cooperative arrangements with local wireless Internet service providers; and

001.04(C)(vii) Cooperation by the incumbent local exchange carrier from which support has been withheld.

001.04(D) In entering an order redirecting support, the Commission will establish a timeline for deployment that includes periodic milestones for ensuring timely deployment and will subject the ETC with reporting duties sufficient to assess compliance with deployment milestones.

## 001.05 REVERSE AUCTIONS.

001.05(A) If pursuant to Neb. Rev. Stat. § 86-330 and the rules set forth in this Chapter ~~16~~, the Commission withdraws Support provided to an ETC, the Commission may use such withdrawn Support to implement and operate a Reverse Auction program, provided that such withdrawn Support is required to be utilized in the same area for which the Support was originally granted.

001.05(B) Areas eligible for the Reverse Auction program will be determined by the Commission and will be:

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001.05(B)(i) Released to the public by the Commission in a notice published in accordance with the Commission's Rules of Procedure which includes the specific timeframe for Reverse Auction application submittals and any other information relevant to the Reverse Auction process.

001.05(C) An applicant participating in a Reverse Auction must include the following information in any application for Support filed with the Commission:

001.05(C)(i) A description of the applicant's business structure and ownership information;

001.05(C)(ii) Evidence that the applicant is financially and technically qualified to meet the public interest obligations for each relevant area for which it seeks Support;

001.05(C)(iii) Evidence to confirm applicant's status as an ETC or that, should it be the successful bidder for the Reverse Auction, will seek such ETC status within thirty (30) days after the close of the Reverse Auction;

001.05(C)(iv) Confirmation that the applicant plans to provide access to broadband Internet service at speeds defined by the Commission in the area or areas subject to the Reverse Auction;

001.05(C)(v) A description of the technology or technologies that will be used to provide service in the area or areas subject to Reverse Auction;

001.05(C)(vi) Any information required to establish eligibility for any bidding weights adopted by the Commission and described in an order or public notice;

001.05(C)(vii) To the extent that an applicant plans to use licensed or unlicensed spectrum to offer its voice and broadband services in the area or areas subject to Reverse Auction, a demonstration that it has the proper authorizations to use such spectrum, that use of such spectrum will not cause any interference with existing users, and that the spectrum resources will be sufficient to cover peak network usage and deliver the minimum performance requirements to serve the Fund-eligible area or areas defined in the Reverse Auction, and certify that it will retain its access to and the use of the spectrum for at least 10 years from the date of the Support authorization;

001.05(C)(viii) A description of how the required construction will be funded, including financial projections to demonstrate, if applicable, that the applicant can cover the necessary debt service payments over the life of any loan obtained to fund construction;

001.05(C)(ix) Specified operational and financial information including:

001.05(C)(ix)(1) A certification that the applicant has provided a voice and/or broadband Internet service for at least two years or that it is affiliated with such an entity, and specifying the number of years the applicant or its affiliate has been operating, and submission of the financial statements from the prior fiscal year that are audited by a certified public accountant. If the applicant's financial statements are not audited in the ordinary course of business, in lieu of submitting audited financial statements, the applicant must certify that it will provide financial statements from the prior fiscal year that are audited by a certified independent public accountant by a specified deadline during the review process.

001.05(C)(ix)(1)(a) If the applicant or an affiliate has provided a voice and/or broadband Internet service it must certify that it or its affiliate has filed FCC Form 477s as required during the relevant time period that such voice or broadband Internet service has been provided.

001.05(C)(ix)(1)(b) If the applicant has operated in other states, applicant is required to submit evidence that the applicant is in good standing in those states.

001.05(C)(x) If an applicant cannot meet the requirements in section 001.05(C)(ix)(1) above, in the alternative it must submit the audited financial statements from the three most recent fiscal years; and Such additional information as the Commission may require.

## 001.05(D) APPLICATION PROCESSING.

001.05(D)(i) No application will be considered unless it has been submitted in an acceptable form during the period specified by public notice. No applications submitted or demonstrations made at any other time will be accepted or considered.

001.05(D)(ii) Any application that, as of the submission deadline, either does not identify the applicant seeking Support as specified in the public notice announcing application procedures or does not include required certifications will be denied.

001.05(D)(iii) An applicant may be afforded an opportunity to make minor modifications to amend its application or correct defects noted by the applicant, the Commission, or other parties. Minor modifications include correcting typographical errors in the application and supplying non-material information that was inadvertently omitted or was not available at the time the application was submitted.

001.05(D)(iv) Applications to which major modifications are made after the deadline for submitting applications will be denied. Major modifications include,

but are not limited to, any changes in the ownership of the applicant that constitute an assignment or change of control, or the identity of the applicant, or the certifications required in the application.

001.05(D)(v) After receipt of all necessary information, a public notice will identify each winning bidder that is authorized to receive auction support.

001.05(D)(vi) Once all applications for a Reverse Auction have been accepted by the Commission as meeting the criteria established in this Chapter 16, the Commission will issue an order announcing the timing and conduct of the Reverse Auction.

001.05(E) FULL AND TIMELY PERFORMANCE. Authorization to receive auction Support is conditional upon full and timely performance of all of the requirements set forth in this section, and any additional terms and conditions upon which the Support was granted.

001.05(E)(i) Failure by a recipient of Support from a Reverse Auction to meet its service milestones will trigger reporting obligations and the withholding of Support. Failure to come into full compliance within 12 months will trigger a recovery action. If the recipient does not repay the requisite amount of Support within six months thereafter, the Commission will be entitled to seek recovery through any means available to the state for recovery of a debt to the state and may disqualify the recipient from the receipt of any, all or additional Support.

001.05(E)(ii) The default will be evidenced by a letter issued by the Executive Director of the Commission or his designee.

## 001.06 WIRELESS REGISTRY

001.06(A) The Commission will maintain a wireless registry to be used for the purpose specified in Neb. Rev. Stat. § ~~86-579~~ 75-160.

001.06(B) The Commission will make available on its website or through paper filing a repository for any person or company to file information indicating a lack of appropriate coverage as defined in Neb. Rev. Stat. ~~86-579~~ 75-160, ~~section 5(3)~~. The form will include the following information:

001.06(B)(i) The name of the person filing the informal complaint

001.06(B)(ii) The name of the wireless carrier, if applicable;

001.06(B)(iii) The address or locations where service was at issue;

001.06(B)(iv) A description of the services purchased and equipment used by the complainant; and

001.06(B)(v) The relevant date or dates for which wireless service coverage was lacking.

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001.06(B)(vi) The wireless provider may challenge this information by providing evidence of adequate coverage in the relevant location(s).

001.06B(vii) The Commission may further investigate to determine the existence of or the lack of adequate coverage. In doing so, the Commission may utilize other publicly available data and crowd-sourced data to determine the reliability of the information provided for purposes of the registry.